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Opinion No. 01-146

Records Concerning HIV Patients

QUESTIONS

1. Is the District Attorney General an "appropriate state agency," as mentioned in Tenn. Code Ann. § 68-10-113 (1)- (5), to receive health department records regarding a person who has HIV?

2. Must the District Attorney General obtain a court order, under Tenn. Code Ann. § 68-10-113 (6), to obtain access to health department records regarding a person who has HIV?

3. Does Tenn. Code Ann. § 68-10-114 prohibit a health department employee from talking to the District Attorney General about the *mens rea* of a criminal defendant, whom the District Attorney General either is prosecuting, or is considering prosecuting, for knowingly exposing someone to HIV?

4. Does Tenn. Code Ann. §§ 68-10-111, *et seq.*, preclude a health department worker from discussing with the District Attorney General's Office, factual information regarding an HIV patient which is not noted in the patient's chart, but which would go to the patient's intention to commit a crime?

OPINIONS

1. No. The District Attorney General is not an "appropriate state agency," under Tenn. Code Ann. § 68-10-113 (3), to receive health department records regarding a person who has HIV. The only exceptions would be circumstances in which the District Attorney General is prosecuting, or is considering prosecuting, an individual either under Tenn. Code Ann. § 39-13-108 or Tenn. Code Ann. § 68-10-111.

2. Yes. Other than in the limited circumstances excepted above, the District Attorney General must obtain a court order, under Tenn. Code Ann. § 68-10-113 (6), to obtain access to health department records regarding a person who has HIV, unless release is made with the consent of all persons identified in the information released.

3. Yes. Absent a consent under Tenn. Code Ann. § 68-10-113 (2), or a court order under Tenn. Code Ann. § 68-10-113 (6), a health department employee is prohibited from talking to the District Attorney General about the *mens rea* of a criminal defendant whom the District Attorney General either is prosecuting, or is considering prosecuting, for knowingly exposing someone to HIV. We base our conclusion, however, on Tenn. Code Ann. § 68-10-113, rather than on Tenn. Code Ann. § 68-10-114.

4. Yes. Tenn. Code Ann. § 68-10-113 protects as strictly confidential all records and information held by the department or local health department relating to known or suspected cases of sexually transmitted disease. Assuming that the crime in question does not fall within either of the two limited exceptions we have identified, unless such information is released with a consent under Tenn. Code Ann. § 68-10-113 (2), or a court order under Tenn. Code Ann. § 68-10-113 (6), any health officer who violates the strict confidentiality requirements imposed by Tenn. Code Ann. § 68-10-113 commits a Class C misdemeanor under Tenn. Code Ann. § 68-10-111.

ANALYSIS

A delicate interrelationship exists between the health related statutes which govern the control and spread of sexually transmitted diseases, Tenn. Code Ann. §§ 68-10-101, *et seq.*, and the criminal statutes which govern the same subject matter, Tenn. Code Ann. §§ 39-13-108, 39-13-109, 39-13-112, 39-13-516, and 39-13-521. The focus of the former, of course, is on the medical and epidemiological measures to be directed toward that end, while the focus of the latter, necessarily, relates to the deterrence goals of the criminal code. Both the state or local health department officer, as well as the District Attorney General, have a duty to enforce the statutory measures which are available to each of them, respectively, in order to protect the public from either the negligent, or willful, spread of sexually transmitted diseases. In some ways, their concomitant efforts to control the spread of such diseases dovetail, while in other ways, their efforts necessarily diverge. Occasionally, there is antinomy between the two legislative schemes. Yet, in one major aspect, both the health related statutes and regulations concerning sexually transmitted diseases, as well as the criminal statutes concerning sexually transmitted diseases, evince the same concern: maintaining appropriate confidentiality of records and information received. Tenn. Code Ann. §§ 68-10-113, 68-10-114; Tenn. Code Ann. §§ 39-13-112, 39-13-521. In this context, we conclude:

1. Except in circumstances in which the District Attorney General is prosecuting, or is considering prosecuting, an individual, either under Tenn. Code Ann. § 39-13-108, or under Tenn. Code Ann. § 68-10-111, the District Attorney General is not an "appropriate state agency," under Tenn. Code Ann. § 68-10-113 (3), to receive health department records regarding a person who has HIV. Tenn. Code Ann. § 68-10-113 imposes a duty of strict confidentiality upon the Department of Health, as well as upon the various local health departments, concerning all records or information relating to known or suspected cases of sexually transmitted disease. Tenn. Code Ann. § 68-10-113 provides:

All records and information held by the department or a local health department relating to known or suspected cases of sexually transmitted disease shall be strictly confidential. *Such information shall not be released or made public upon subpoena, court order, discovery, search warrant or otherwise, except* that release may be made under the following circumstances:

(1) Release is made of medical or epidemiological information for statistical purposes in such form that no individual person can be identified;

(2) Release is made of medical or epidemiological information with the consent of all persons identified in the information released;

(3) Release is made of medical or epidemiological information to medical personnel, appropriate state agencies, or county or district courts *to enforce the provisions of this chapter and related regulations governing the control and treatment of sexually transmitted diseases;*

(4) Release is made of medical or epidemiological information to medical personnel in a medical emergency to the extent necessary to protect the health or life of the patient;

(5) In a case involving a minor not more than thirteen (13) years of age, only the name, age, address and sexually transmitted disease treated shall be reported to appropriate agents as required by the Tennessee Child Abuse Law (§ 37-1-403). *No other information shall be released*. If the information to be disclosed is required in a court proceeding involving child abuse, the information shall be disclosed in camera;

(6) (A) Release is made during a legal proceeding when ordered by a trial court judge, designated by Tenn. Code Ann. § 16-2-502, or a juvenile court judge through an order explicitly finding each of the following:

(i) The information sought is material, relevant, and reasonably calculated to be admissible evidence during the legal proceeding;

(ii) The probative value of the evidence outweighs the individual's and the public's interest in maintaining its confidentiality;

(iii) The merits of the litigation cannot be fairly resolved without the disclosure; and

(iv) The evidence is necessary to avoid substantial injustice to the party seeking it and, either the disclosure will result in no significant harm to the person examined or treated, or it would be substantially unfair as between the requesting party and the person examined

or treated not to require the disclosure.

(B) A juvenile court judge shall make the findings set forth in subdivision (6) (A) *by examining the information, in camera, and shall order the information placed under seal.* Such judge shall only examine the records of a juvenile who is under the jurisdiction of the court. (emphasis added).

Tenn. Code Ann. § 68-10-113 (1) - (5) contains only one reference to disclosure of health department records or information to "appropriate state agencies."[1] Tenn. Code Ann. § 68-10-113 (3) permits release of medical or epidemiological information to "medical personnel, appropriate state agencies, or county and district courts *to enforce the provisions of this chapter and related regulations*, governing the control and treatment of sexually transmitted diseases," (emphasis added), rather than to enforce violations of the criminal statutes related to sexually transmitted diseases. Indeed, other than the Class C misdemeanor penalty, imposed by Tenn. Code Ann. § 68-10-111 upon any health officer or other persons who fail to perform duties required of them by, or who violate any provisions of, Tenn Code Ann. §§ 68-10-101, *et seq.*, there is scant allusion in Tenn. Code Ann. 68-10-101, *et seq.*, to the criminal statutes regarding sexually transmitted diseases. Certainly, the District Attorney General is not in a position to enforce most provisions of Tenn. Code Ann. §§ 68-10-101, *et seq.*, relative to protection of the public health by state, district, county and municipal health officers. However, the District Attorney General, and none other, indeed is in a position to prosecute violations of Tenn. Code Ann. § 68-10-111. (Ironically, Tenn. Code Ann. § 68-10-111 is the very section, under which any health officer releasing information to the District Attorney General outside the parameters of the strict confidentiality requirements mandated by Tenn. Code Ann. § 68-10-113, might be prosecuted by the District Attorney General).

Because the specific purpose of Tenn. Code Ann. § 68-10-113 (3), relative to release of medical or epidemiological information to "appropriate state agencies," is directed toward a limited end, "....to enforce the provisions *of this chapter and related regulations* governing the control and treatment of sexually transmitted diseases," it is our opinion that, with two exceptions, the District Attorney General is not an "appropriate state agency," as mentioned in Tenn. Code Ann. § 68-10-113 (3), to receive health department records regarding a person who has HIV. The first exception, Tenn. Code Ann. § 68-10-111, we have discussed. The second exception, Tenn. Code Ann. § 39-13-108, establishes a criminal

[1]Tenn. Code Ann. § 68-10-113 (5) concerns reports made to "appropriate agents," under the Tennessee Child Abuse Law, Tenn. Code Ann. § 37-1-403. Tenn. Code Ann. § 37-1-403 (g) states specifically: "Every physician or other person who makes a diagnosis of, or treats, or prescribes for any venereal disease set out in § 68-10-101, or venereal herpes and chlamydia, in children thirteen (13) years of age or younger, and every superintendent or manager of a clinic, dispensary, or charitable or penal institution, in which there is a case of any of the diseases, as set out in this subsection, in children thirteen (13) years of age or younger shall report the case immediately, in writing on a form supplied by the department of health to that department. If the reported cases are confirmed and if sexual abuse is suspected, *the department of health will report the case to the department of children's services. The department of children's services will be responsible for any necessary follow-up.*" (emphasis added). Clearly, the "appropriate agents," referred to in Tenn. Code Ann. § 68-10-113 (5), are representatives of the Department of Children's Services.

offense, violation of which is a Class E felony, the quarantine and regulatory aspects of which are to be implemented by the Department of Health, under rules and regulations promulgated by the Department of Health. Tenn. Code Ann. § 39-13-108 provides:

> (a) The department of health, acting pursuant to § 68-10-109, shall promulgate rules regarding transmission of HIV. Such rules shall include specific procedures for quarantine or isolation, as may be necessary, of any person who clearly and convincingly demonstrates willful and knowing disregard for the health and safety of others and who poses a direct threat of significant risk to the health and safety of the public regarding transmission of HIV.
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> (b) The department is authorized to quarantine or isolate such person within a secure facility, after exercising other appropriate measures, if the person continues to pose a direct threat of significant risk to the health and safety of the public. Any such person so quarantined or isolated within a secure facility, who intentionally escapes from such facility, commits a Class E felony.

Clearly, prosecution of an individual by the District Attorney General for a violation of Tenn. Code Ann. § 39-13-108 falls within the ambit of Tenn. Code Ann. § 68-10-113 (3), "....to enforce the provisions of this chapter and related regulations governing the control and treatment of sexually transmitted diseases." Other than these two limited exceptions, however, we conclude that the District Attorney General is not an "appropriate state agency," within the meaning of Tenn. Code Ann. § 68-10-113 (3), to receive health department records regarding a person who has HIV.

2. Since, other than in the limited circumstances excepted above, the District Attorney General is not an "appropriate state agency," within the meaning of Tenn. Code Ann. § 68-10-113 (3), to receive health department records concerning a person who has HIV, the District Attorney General must obtain a court order, under Tenn. Code Ann. § 68-10-113 (6), to obtain access to health department records regarding a person who has HIV. (Our analysis would, of course, exclude the circumstance in which medical or epidemiological information is released with the consent of all persons identified in the information released, Tenn. Code Ann. § 68-10-113 (2).) In *State v. Alexander Fears*, 659 S. W. 2d 370 (Tenn. Cr. App. 1983), the court addressed the issue of access to medical records concerning sexually transmitted disease, and, in so doing, construed two statutory provisions, each of which have been amended since the decision in the *Fears* case: Tenn. Code Ann. § 10-7-504 (a), and Tenn. Code Ann. § 68-10-101. The *Fears* case was decided prior to the 1988 enactment, and 1992 re-enactment, of Tenn. Code Ann. § 68-10-113, which established strict requirements concerning disclosure of health department records and information regarding sexually transmitted diseases, and which prohibits release or public disclosure of such information, either by subpoena, court order, discovery, search warrant, or otherwise, except in conformance with the requirements of that section. With this in mind, it is clear that *Fears* is only marginally valuable to our analysis, since, although it has not been overturned, its holding is, nevertheless, constricted by subsequent legislative enactments. Rejecting the defendant's Fourth Amendment argument,

the court in *Fears* dispelled the notion that the defendant had any legitimate Fourth Amendment expectation of privacy in his medical records which were in possession of, and owned by, the Lentz Public Health Center.[2] The court also rejected the defendant's reliance on the above statutory provisions, and, in so doing, invoked the language of Tenn. Code Ann. § 68-10-104. The court held:

> We do not think that these code sections are applicable. While they protect medical records of patients from members of the public, the statutes do not protect the medical records from the courts and public officials, such as the District Attorney General, in the performance of their official duties. Tenn. Code Ann. § 68-10-104 expressly requires state health officers to cooperate with proper officials whose duty it is to enforce laws against prostitution, lewdness, assignation, and the spread of venereal disease. Courts, grand juries, and district attorneys are not embraced in the term "public" as used in these statutes. The records may be subpoenaed to court at the request of any party to a litigation acting in good faith.

Id., 659 S. W. 2d at 376. Despite the holding in *Fears*, since enactment of Acts 1988, Chapter 695, §§ 1,2, and Acts 1992, Chapter 887, §§1,2 (codified at Tenn. Code Ann. § 68-10-113), records and information held by the department or a local health department relating to known or suspected cases of sexually transmitted disease *"....shall not be released or made public upon subpoena, court order, discovery, search warrant, or otherwise...."* (emphasis added), unless falling within one of the exceptions which, we believe, would allow such release, or unless the court order comports with the requirements set out in Tenn. Code Ann. § 68-10-113 (6). The statutory mandate requiring state health officers to cooperate with proper officials whose duty it is to enforce laws against prostitution, lewdness, assignation, and the spread of venereal disease, Tenn. Code Ann. § 68-10-104 (b), cannot be read to obviate the clear meaning of the later-enacted statutory confidentiality provisions found in Tenn. Code Ann. § 68-10-113. Construing the latter two sections *in pari materia*, we conclude that the phrase, "cooperation," in Tenn. Code Ann. § 68-10-104, cannot be read to mean that the District Attorney General may access records or information held by the department or local health department, without obtaining a court order under Tenn. Code Ann. § 68-10-113 (6), unless the circumstances fall within one

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[2]In another case involving privacy of information concerning sexually transmitted diseases, *Doe v. Wigginton*, 21 F. 3d 733 (6th Cir. 1994), the court invoked its earlier decision in *J.P. v. DeSanti*, 653 F. 2d 1080 (6th Cir. 1981), in rejecting the plaintiff's argument that his "constitutional right to privacy" was violated by the disclosure of plaintiff's HIV infection to a correctional officer. On the other hand, we note that Congress made confidential the information gathered pursuant to the Public Health Act, concerning sexually transmitted diseases. 42 U.S.C. §§ 242m(d), 247c(5). In fact, 42 U.S.C. 242c, which governs state programs which receive federal grants for prevention and control of sexually transmitted diseases, specifically incorporates state confidentiality protections. In addition, 42 C. F. R. § 51b.603 provides: "All information obtained by program personnel in connection with the examination, care, and treatment of an individual in this program shall be held confidential. It shall not be disclosed without the individual's consent *except as may be required by the law of a State*, or political subdivision of a State, or as may be necessary to provide services to the individual. Information may be disclosed in summary, statistical, or other form, or for clinical or research purposes, but only if the disclosure does not identify particular individuals." (emphasis added).

of the exceptions mentioned in our analysis, or unless release of the records or information is made with consent of all persons identified in the information released, under Tenn. Code Ann. § 68-10-113 (2).

Not only the provisions of Tenn. Code Ann. §§ 68-10-101, *et seq.*, but also the criminal statutes regarding release of information concerning sexually transmitted diseases, reflect specific privacy requirements.[3] Under Tenn. Code Ann. § 39-13-112, if a person is initially arrested for a violation of Tenn. Code Ann. § 39-13-102, and if the victim of the assault (limited, for purposes of this section, to a law enforcement officer, firefighter, correctional officer, youth services officer, probation and parole officer, employee of either the Department of Correction, or Department of Children's Services, or a compensated or volunteer emergency medical or rescue worker, emergency medical technician, or paramedic, while performing an official duty), suffered actual contact with the blood or other body fluid of the arrestee, then the arrestee shall undergo HIV testing immediately, at the request of the victim. Tenn. Code Ann. § 39-13-112 (a) (1) provides that "*a licensed medical laboratory*[4] *shall perform such test* at the expense of the arrestee," (emphasis added), while Tenn. Code Ann. § 39-13-112 (b) (1) provides, "*The licensed medical laboratory* shall report the results of the HIV test required under this section immediately to the victim of the assault," (emphasis added). Tenn. Code Ann. § 39-13-112 (b) (2) (A) - (G) provides:

> The result of the HIV test required under this section *is not a public record and shall be available only to:*
> (A) The victim of the assault;
> (B) The parent or guardian of a minor or incapacitated victim;
> (C) The attending physician of the person tested and of the victim;
> (D) The department of health;
> (E) The department of correction;
> (F) The person tested; and
> (G) The district attorney general prosecuting the case.
> (emphasis added).

Additionally, Tenn. Code Ann. § 39-13-521 mirrors similar HIV testing and privacy provisions regarding persons initially arrested for allegedly violating Tenn. Code Ann. § 39-13-502 (aggravated rape); Tenn. Code Ann. § 39-13-503 (rape); Tenn. Code Ann. § 39-13-506 (statutory rape); and Tenn. Code Ann.

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[3]In 1993, we issued an opinion in which we discussed Tenn. Code Ann. § 39-13-521 (b), (amended subsequently by Acts 1994, Chapter 989, § 2; and Acts 1994, Chapter 995, § 1), and in which we opined that the section (then in effect) prohibited jail officials, health officials, and attorneys from having access to the HIV test results, because the statute provided that the defendant obtain the test and return a certified copy of the test results to the judge, who, in turn, examines the results in camera and seals the record. Our opinion also referenced the strict confidentiality requirements of Tenn. Code Ann. § 68-10-113, as well as Tenn. Code Ann. § 68-10-114. Tenn. Op. Atty. Gen. No. 93-31 (4/ 2/ 93).

[4]Tenn. Code Ann. §68-29-104 (8), concerning medical laboratories, excepts from application of Tenn. Code Ann. §§ 68-29-101, *et seq.*, "Laboratories under the jurisdiction of county health departments in the state of Tennessee and such other laboratories as defined by the board."

§ 39-13-522 (rape of a child). Moreover, the confidentiality requirements in Tenn. Code Ann. § 39-13-521 (e) (1), concerning disclosure of HIV test results of an individual convicted of prostitution, are even more restrictive. Tenn. Code Ann. § 39-13-521 (e) (1) provides:

> Upon the conviction of the defendant for a violation of § 39-13-513, the court shall order the convicted person to submit to an HIV test. Such test shall be performed by *a licensed medical laboratory* at the expense of the defendant. The defendant shall obtain a confirmatory test when necessary. The defendant shall return a certified copy of the results of all tests to the court. *The court shall examine results in camera and seal the record.* For the sole purpose of determining whether there is probable cause to prosecute a person for aggravated prostitution under § 39-13-516, the district attorney general may view the record notwithstanding the provisions of subdivision (b) (2). *The district attorney general shall be required to file a written, signed request with the court stating the reason the court should grant permission for the district attorney general to view the record.* If the test results indicate the defendant is infected with HIV, then the district attorney general may use the results of the test in a prosecution for aggravated prostitution.
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> (emphasis added).

The above sections reflect, certainly, a legislative concern for limited dissemination and privacy of HIV test information. However, we note that these sections also mandate that such HIV testing be performed by a licensed medical laboratory, which, by definition, does not include laboratories under the jurisdiction of the county health departments in the state of Tennessee. Tenn. Code Ann. § 68-29-104 (8). If the District Attorney General were to obtain HIV test information from a licensed medical laboratory, as provided for in Tenn. Code Ann. § 39-13-112 and Tenn. Code Ann. § 39-13-521 (a) - (d), which, under such circumstances, the licensed medical laboratory is legally bound to make available to the District Attorney General, then, of course, no court order under Tenn. Code Ann. § 68-10-113 (6) would be necessary. If, on the other hand, the District Attorney General were to seek HIV test information concerning an individual who already has been convicted of the offense of prostitution under Tenn. Code Ann. § 39-13-513, then the District Attorney General must follow the procedures outlined in Tenn. Code Ann. § 39-13-521 (e). In any event, we conclude that if the District Attorney General seeks HIV records or information held by the department, or by a local health department, under circumstances which are neither excepted under Tenn. Code Ann. § 39-13-108 or Tenn. Code Ann. § 68-10-111, nor excluded due to the consent of all persons identified in the medical or epidemiological information to be released, Tenn. Code Ann. § 68-10-113 (2), then the District Attorney General must obtain a court order, under Tenn. Code Ann. § 68-10-113 (6), for release of such records or information.

3. We conclude that a health department employee is prohibited from talking to the District Attorney General about the *mens rea* of a criminal defendant whom the District Attorney General is prosecuting, or is considering prosecuting, for knowingly exposing someone to HIV. However, we base our conclusion on Tenn. Code Ann. § 68-10-113, rather than on Tenn. Code Ann. § 68-10-114. Tenn. Code Ann. § 68-10-114 provides:

> Except as provided in § 68-10-113 (1) - (6), no state or local department officer or employee shall be examined in a civil, criminal, special, or other proceeding as to the existence or contents of pertinent *records* of a person examined or treated for a sexually transmitted disease by a state or local health department, or of the existence or contents of such *reports* received from a private physician or private health facility. (emphasis added).

Tenn. Code Ann. § 68-10-114 prohibits examination of a health department employee only as to the existence or contents of *records* or *reports*, while Tenn Code Ann. § 68-10-113 provides that all records *and information* held by the department or local health department relating to known or suspected cases of sexually transmitted disease shall be strictly confidential. (emphasis added). Therefore, it is Tenn. Code Ann. § 68-10-113, rather than Tenn. Code Ann. § 68-10-114, which prohibits a health department employee from talking to the District Attorney General about the *mens rea* of a criminal defendant whom the District Attorney General either is prosecuting, or is considering prosecuting, for knowingly exposing someone to HIV. In any event, no health department employee ever may discuss such information with the District Attorney General without obtaining either a consent under Tenn. Code Ann. § 68-10-113 (2), or a court order under Tenn. Code Ann. § 68-10-113 (6). This is because "*knowingly* exposing someone to HIV," by definition, is the offense of criminal exposure to HIV under Tenn. Code Ann. § 39-13-109, rather than the health related offense of exposure of others by a person infected with a sexually transmitted disease, under Tenn. Code Ann. § 68-10-107. Moreover, since there is no apparent nexus between Tenn. Code Ann. § 39-13-109 and Tenn. Code Ann. § 68-10-107, prosecution or intended prosecution of an individual for "*knowingly* exposing someone to HIV," under Tenn. Code Ann. § 39-13-109, would be unrelated to enforcement of the provisions of Tenn. Code Ann. §§ 68-10-101, *et seq.*, and thus, not subject to the exception we have identified arising out of Tenn. Code Ann. § 68-10-111.

4. The confidentiality provisions of Tenn. Code Ann. § 68-10-113 render strictly confidential "all records *and information* held by the department or local health department relating to known or suspected cases of sexually transmitted disease." (emphasis added). Clearly, the confidentiality restrictions are not limited to written information recorded in the patient's chart. Rather, the confidentiality restrictions of Tenn. Code Ann. § 68-10-113 extend to *"all records and information,"* (emphasis added). Tenn. Code Ann. § 68-10-111 provides:

> Any health officer or any other persons who fail to perform the duties required of them in this chapter, or violate any of the provisions of same, or of any rule or bylaw promulgated under its authority, commit a Class C misdemeanor. Each violation is a separate offense.

It is our opinion, therefore, that absent either a consent under Tenn. Code Ann. § 68-10-113 (2), or a court order under Tenn. Code Ann. § 68-10-113 (6), a health department employee is precluded under Tenn. Code Ann. § 68-10-111, as well as Tenn. Code Ann. § 68-10-113, from discussing with the District Attorney General, factual information regarding an HIV patient which is not recorded in the patient chart, but which would go to the patient's intention to commit a crime. Our opinion assumes, of course,

that the crime in question does not fall within the ambit of either of the two limited exceptions which we have identified previously, namely, prosecution under Tenn. Code Ann. § 39-13-108, or prosecution of a health related offense under Tenn. Code Ann. § 68-10-111.

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